Supreme Court, U.S.
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No. 87-818

In the Supreme Court of the United States

OCTOBER TERM, 1987

KIP HAYES, PETITIONER

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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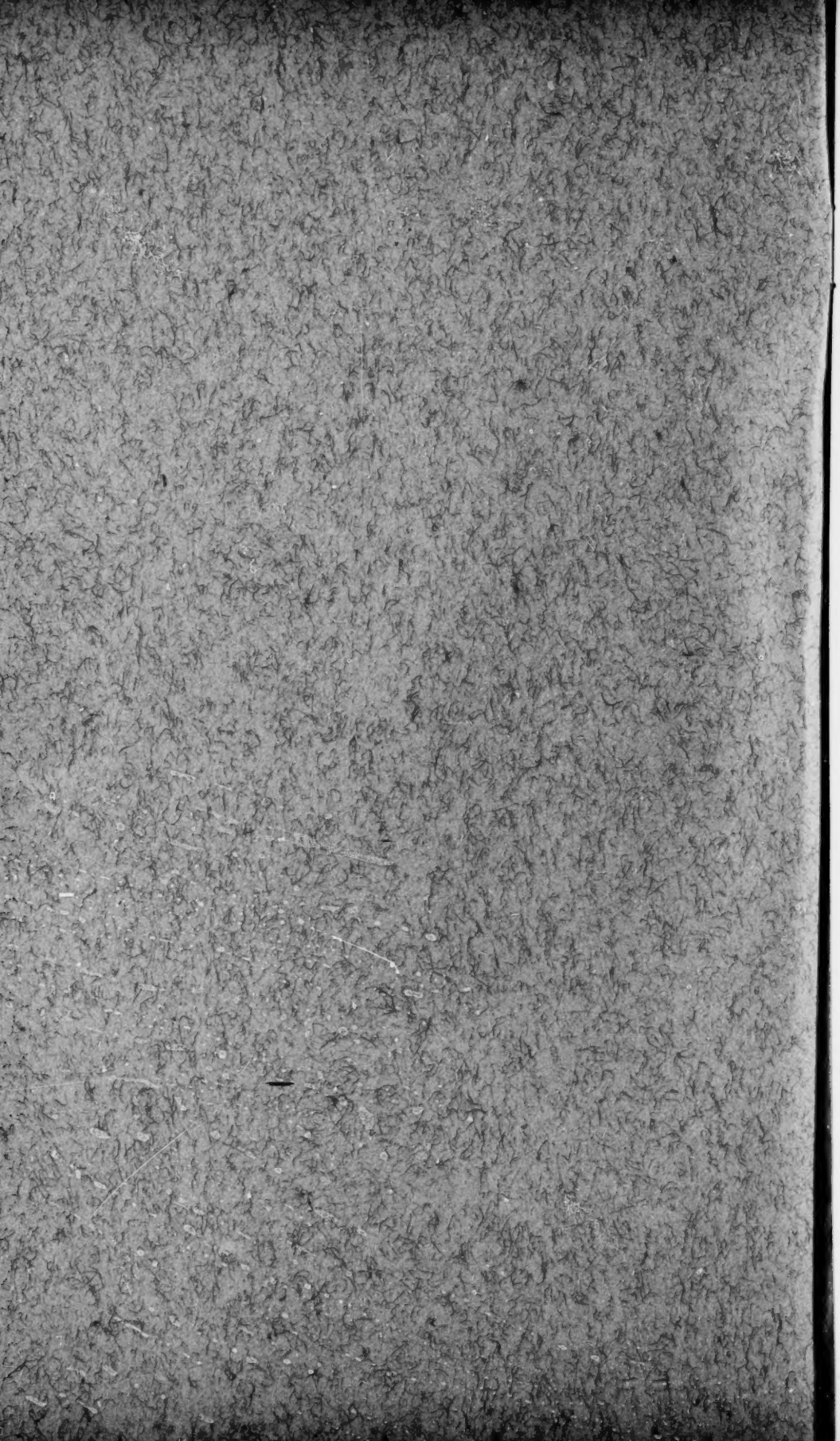

QUESTION PRESENTED

Whether the obligations of a provider of federal employee health benefits under the Federal Employee Health Benefits Act, 5 U.S.C. (& Supp. IV) 8901 *et seq.*, are to be determined solely under the applicable benefits contract between the provider and the Office of Personnel Management (OPM).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B14) is reported at 819 F.2d 921. The opinion of the district court (Pet. App. A1-A4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1987. A petition for rehearing was denied on July 21, 1987 (Pet. App. C1). On October 2, 1987, Justice O'Connor ordered that the time for filing a petition for a writ of certiorari be extended to and including November 18, 1987. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Kip Hayes is the son of respondent Nobel Hayes, a retired federal employee who, at the times

relevant to this case, was covered by a health benefit plan provided by respondent National League of Postmasters (NLP or Postmasters). As a result of a severe injury, petitioner requires full-time private nursing care. Pet. App. B6.

Respondent Nobel Hayes was enrolled in a health benefit plan provided by respondent Postmasters pursuant to a contract between Postmasters and the federal respondent, Office of Personnel Management (OPM) (Pet. App. B5-B6). The contract between Postmasters and OPM was entered into under the Federal Employees Health Benefits Act (FEHBA), 5 U.S.C. (& Supp. IV) 8901 *et seq*. Under FEHBA, OPM "contracts with various private carriers to develop health care plans with varying coverages and costs. The plans are for a term of one year, and are renegotiated annually." Pet. App. B5. FEHBA contains an express preemption provision, which states that "[t]he provisions of any contract under [FEHBA] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans to the extent that such law or regulation is inconsistent with such contractual provisions" (5 U.S.C. 8902(m)(1)).

In 1982, when Nobel Hayes enrolled in it, the Postmasters plan contained no limit on the amount that would be paid for private duty nursing care. In 1984 and 1985, however, the Postmasters plan "contained a $10,000 limit on benefits for private duty nursing care." Pet. App. B6. The annual cost for private duty nursing care for petitioner substantially exceeds $10,000.

2. In February 1984, Postmasters filed an action in the United States District Court for the Southern District of California (*NLP* v. *OPM*, No. CV-84-0341-LCN) in which it named Nobel Hayes and OPM as defendants and

"sought a declaration that private duty nursing care benefits provided under its 1982 Plan could be reduced in subsequent policy contract years and that under its 1984 Plan Postmasters was not obligated to provide Kip Hayes with private nursing benefits in excess of $10,000" (Pet. App. B6-B7). Although named as a defendant, OPM agreed with the plaintiff, Postmasters, as to the merits.

In April 1984, petitioner brought an action in California Superior Court against Postmasters, Nobel Hayes, and respondent Prudential Insurance Company of America (Prudential) (Pet. App. B7). OPM was not named as a defendant in this action. The suit was removed to the federal district court for the Southern District of California (*Hayes* v. *Prudential*, No. CV-84-1245-LCN) and assigned to the same judge who was handling *NLP* v. *OPM*. In his suit, petitioner "alleged that his enrollment in the 1982 Plan gave him a vested contractual right to receive, indefinitely, unlimited private duty nursing care benefits * * * [and] sought damages alleging various state law causes of action" (Pet. App. B7).

When Postmasters moved for summary judgment in the first action, *NLP* v. *OPM*, petitioner (who was not a party) filed a memorandum of points and authorities in opposition. In a footnote, he requested that the court join him as a defendant in that suit (see OPM C.A. Br. 3-4 n.3). However, petitioner did not serve on the parties a motion to intervene pursuant to Fed. R. Civ. P. 5 and 24(c) (OPM C.A. Br. 3), and the district court never entered an order permitting him to intervene in *NLP* v. *OPM* (*id.* at 3-4).

In *NLP* v. *OPM*, the district court granted summary judgment for Postmasters, finding that "benefits for private duty nursing care lawfully had been reduced to $10,000 in the 1984 Postmasters Plan and that Postmasters accordingly was not required to pay claims in

excess of that amount" (Pet. App. B7). Similarly, in *Hayes* v. *Prudential*, the district court granted summary judgment in favor of defendants "on the grounds that the benefits lawfully had been reduced, and that the state law claims were preempted under FEHBA" (*ibid.* (citation omitted)).

3. Petitioner filed notices of appeal from both judgments to the Ninth Circuit (No. 85-5527 (*Hayes* v. *Prudential*); No. 85-5528 (*NLP* v. *OPM*)); none of the parties in *NLP* v. *OPM*—Postmasters, OPM and Nobel Hayes—filed a notice of appeal from the judgment in that case. In the court of appeals, OPM argued that there was no proper appeal from the judgment in *NLP* v. *OPM* (the only suit to which it was a party), because petitioner, the only appellant, was not plaintiff or a named defendant in that suit and had never properly sought or been granted intervention in it. OPM accordingly moved the court of appeals to dismiss the appeal from *NLP* v. *OPM*, and also moved to intervene in the appeal from *Hayes* v. *Prudential* so that it would be able to present its views on the merits. See OPM C.A. Br. 4-5.

On the jurisdictional question, "[a] motions panel of [the Ninth Circuit] * * * determined that Kip Hayes' appeal in *NLP v. OPM* was effective" (Pet. App. B8). The merits panel explained that "[t]he district court treated appellant's request [to intervene] as a motion for consolidation with *Hayes v. Prudential*, and consolidated the cases. Consolidation by the district court led the motions panel to conclude that Kip Hayes effectively appealed from the summary judgment in *NLP v. OPM*" (*ibid.*).

On the merits, the court of appeals rejected petitioner's arguments under both Postmasters' contract with OPM and state law. Petitioner had claimed that the contract's $10,000 limit was not applicable to him because FEHBA required NLP and Prudential to comply with OPM direc-

tives ordering them to remove it (Pet. App. B8-B9). The court of appeals, however, found that the record indicated "only that OPM unsuccessfully sought Postmasters' voluntary agreement to amend the 1984 contract," and concluded that there were "no legal or factual bases for [petitioner's] claim that Postmasters or Prudential violated a binding OPM directive" (*id.* at B10). The court of appeals also found meritless petitioner's claim that the contract's catastrophic protection provision granted him unlimited benefits, finding instead that the catastrophic provision was governed by the $10,000 limit (*id.* at B10-B11).

The court of appeals then found (Pet. App. B12-B13) petitioner's state law claims preempted by FEHBA (5 U.S.C. 8902(m)(1)), which provides that contract provisions "which relate to the nature or extent of coverage or benefits (including payment with respect to benefits)" preempt inconsistent state law that "relates to health insurance or plans." Petitioner had maintained that his claims related "to the manner in which Postmasters and Prudential *processed* his benefits, and not to the 'nature or extent of coverage or benefits' " (Pet. App. B12-B13 (emphasis in original)), but the court of appeals found that "[t]ort claims arising out of the manner in which a benefit claim is handled are not separable from the terms of the contract" (*id.* at 13 (citation omitted)).

ARGUMENT

Because of the procedural history and posture of this case, there are serious questions as to whether the review sought by petitioner would give him any relief. In any event, the decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner characterizes the procedural posture of this case in a way which, if correct (and we believe it is not), would very likely render any review by this Court purely advisory. That same possibility would arise were this Court to find—as we believe it would if it were to grant the petition—that the court of appeals erred in finding that petitioner had effectively appealed the judgment in *NLP* v. *OPM*.

a. Although not served by petitioner, OPM is a respondent in this Court: the court of appeals' holding that petitioner had properly appealed from the judgment in *NLP* v. *OPM* (a holding we believe to have been incorrect) necessarily implies that the Ninth Circuit decided a single case, and that OPM was a party to that case.

The district court entered separate judgments in *NLP* v. *OPM* and *Hayes* v. *Prudential* (see No. CV-84-0341-LCN (S.D. Cal. Jan. 22, 1985); No. CV-84-1245-LCN (S.D. Cal. Jan. 22, 1985)); OPM was a party to only one of them. Because petitioner had not been permitted to intervene in *NLP* v. *OPM*, OPM argued in the Ninth Circuit that he could not take an appeal from that judgment. The court of appeals, however, found that petitioner's appeal was effective. It reached that conclusion, not because it thought that petitioner had intervened in *NLP* v. *OPM*, but because it found that the district court had consolidated the two cases. Pet. App. B7-B8. Given that a non-party cannot appeal (*Karcher* v. *May*, No. 85-1551 (Dec. 1, 1987), slip op. 4), it is a necessary premise of the court of appeals' holding that petitioner and OPM had become parties to the same lawsuit. Moreover, since the court of appeals recognized (Pet. App. B8) that petitioner's informal request to intervene in *NLP* v. *OPM* was not granted, the court of appeals must have understood the district court's consolidation of the two proceedings to have made them into one lawsuit. Other-

wise, there would have been no case in which OPM and petitioner were both parties, as to which petitioner could properly appeal.

The court of appeals, then, must be understood to have granted one judgment in one action, an action to which OPM was a party. See Pet. App. B14 (emphasis added) ("The *judgment* of the district court *is* affirmed."). Under Rule 19.6 of the Rules of this Court, "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner shall notify the Clerk of this Court in writing of petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below * * *." OPM is therefore a party in this Court.

Petitioner, however, neither served OPM nor provided the Clerk and the parties with written notice of his belief that OPM has no interest in the outcome of the petition. Instead, petitioner takes the position that *NLP* v. *OPM* and *Hayes* v. *Prudential* remain two entirely distinct proceedings, and that he can seek certiorari solely as to the latter, in which OPM is not a party.[1] This view contradicts that of the court of appeals and fails to explain how petitioner was able to appeal *NLP* v. *OPM* to the court of appeals, if he and OPM had never become a party to the same suit.

But even if petitioner is correct in believing that he may seek review only as to *Hayes* v. *Prudential*, it would be unwise to grant the petition. Review of the judgment in *Hayes* would not disturb the judgment in *NLP* v. *OPM*, in which the benefit provider (Postmasters) prevailed against the primary plan enrollee—petitioner's father, Nobel

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[1] This position is expressed in a letter from petitioner to the Clerk of this Court, dated January 25, 1988, opposing our motion for an extension of time within which to file this brief.

Hayes. Accordingly, before it could even address the merits, this Court would have to decide whether Postmasters' judgment against petitioner's father precludes any recovery by petitioner; otherwise, any decision in this case would be advisory. Petitioner suggests no reason to believe that he would prevail on that preliminary inquiry, or that resolving it would be a worthwhile use of this Court's resources.

b. Moreover, that same preliminary issue would arise even if petitioner is wrong about OPM's status as a party in this Court, because the court of appeals was wrong about petitioner's appeal of *NLP* v. *OPM*. The court of appeals treated the district court's consolidation of *NLP* v. *OPM* and *Hayes* v. *Prudential* as if it merged the two cases, making every party to one a party to the other. In so holding, the court of appeals misinterpreted the district court's order. As a general matter, consolidation does not make the parties to the consolidated actions all parties to one lawsuit.[2] In this case, moreover, the district court declined to grant petitioner's motion to intervene in *NLP* v. *OPM* and issued two separate judgments. Petitioner and OPM therefore never became parties to the same suit, and petitioner could not appeal from the judgment involv-

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[2] "[C]onsolidation does not cause one civil action to emerge from two; the actions do not lose their separate identity; the parties to one action do not become parties to the other. *Alfred Dunhill, Inc. v. Republic of Cuba*, 425 U.S. 682, 735, 96 S. Ct. 1854, 1880, 48 L.Ed.2d 301 (1976) (Marshall, J., dissenting); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2382, at 255 (1971); 5 Moore's Federal Practice ¶ 42.03[3], at 42-27 to 42-29 (2d ed. 1982); *see Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 496-97, 53 S.Ct. 721, 727-28, 77 L.Ed. 1331 (1933)." *McKenzie* v. *United States*, 678 F.2d 571, 574 (5th Cir. 1982); see also *Cole* v. *Schenley Indus., Inc.*, 563 F.2d 35, 38 (2d Cir. 1977) ("consolidation cannot effect a merger of the actions").

ing OPM. Thus, if this Court were to grant the petition, but ultimately found that the court of appeals had no jurisdiction over *NLP* v. *OPM*, it would again face a serious question whether any ruling on the merits would be purely advisory.

2. In any event, the court of appeals was correct and its decision does not conflict with that of any other court of appeals. The Ninth Circuit began its treatment of the merits by determining that under Postmasters' contract with OPM, petitioner was not entitled to private duty nursing care expenses in excess of $10,000 per year (Pet. App. B8-B11). (Petitioner does not appear to seek review of this initial holding.) In addition, petitioner had asserted a number of state law claims against the non-federal respondents (*id.* at B12 n.1). The court of appeals, however, held those claims preempted by 5 U.S.C. 8902(m)(1), since they "invariably expand [respondents'] obligations under the terms of the Plan" (Pet. App. B13).

That conclusion was plainly correct. Section 8902(m)(1) states that the provisions of any benefit contract between OPM and a benefit provider "which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law * * * [that is] inconsistent with such contractual provisions." It is difficult to imagine a more explicit way of saying that the nature and extent of benefits are determined solely by the contract, and that state law cannot create any additional right to benefits. The entire point of petitioner's state law claims, however, was to create an obligation to pay benefits where the contract (as the court of appeals held) had not imposed one.[3] Section 8902(m)(1)

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[3] Petitioner attempts to create the impression (*e.g.*, Pet. 16, 27, 30) that the issue in this case is whether he has any remedy for violations of his rights to benefits. However, the only question presented con-

preempts any state law that would do so.[4]

There is no inconsistency among the courts of appeals on this question.[5] Petitioner argues (Pet. 15-20) that the Ninth Circuit's decision conflicts with that in *Howard* v. *Group Hospital Service*, 739 F.2d 1508 (10th Cir. 1984). But the only question in *Howard* was whether a claim for breach of a federal health benefits contract was removable to federal court; the Tenth Circuit held that the district court lacked subject matter jurisdiction because the suit was "a private controversy in which the federal government simply does not have an interest sufficient to justify

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cerns the scope of petitioner's rights, not the remedies available to effectuate those rights. The Ninth Circuit held that petitioner had no right to reimbursement for private duty nursing care expenses in excess of $10,000 per year under the contract and that California law could not provide such a right because of Section 8902(m)(1). No question of remedy, state or federal, was presented. For that reason, petitioner's discussion (Pet. 21-28) of implied causes of action under FEHBA is beside the point.

[4] Petitioner also argues (Pet. 28-30) that Section 8902(m)(1) should not be read as preempting state laws that regulate insurance providers because of the McCarran-Ferguson Act, 15 U.S.C. 1012. Contracts between benefit providers and OPM, however, are federal procurement contracts, not insurance in the ordinary sense of that word. See S. Rep. 95-903, 95th Cong., 2d Sess. 8 (1978). Thus, there is no conflict between Section 8902(m)(1) and the McCarran-Ferguson Act.

[5] Petitioner suggests (Pet. 28-30) that the Ninth Circuit's decision here conflicts with a decision of the California Court of Appeal, *Fields* v. *Blue Shield*, 163 Cal. App. 3d 570, 209 Cal. Rptr. 781 (1985). *Fields*, however, appears to be in tension with another California Court of Appeal's decision, *Hartenstine* v. *Superior Court*, 196 Cal. App. 3d 206, 241 Cal. Rptr. 756 (1987), which is in turn consistent with the decision below. Thus, even if a conflict between the views of a state court and a federal court of appeals warranted review by this Court—which it ordinarily does not—the position of the California courts has yet to be clarified by the Supreme Court of California.

invoking federal question jurisdiction" (*id.* at 1512). Accordingly, *Howard* presented a completely different issue from this case: whether an attempt to recover under the terms of a federal benefits contract arises under federal laws, not whether an attempt to add to the provisions of a federal benefits contract is preempted by federal law. Indeed, the Tenth Circuit specifically determined that no issue of preemption was presented under Section 8902(m)(1), finding "no indication that any law of Oklahoma conflicts with the medical necessity or any other provision of the Blue Cross contract" (739 F.2d at 1510 n.1).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1988

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[6] *Howard*, moreover, was decided before this Court's explicit preemption decision in *Pilot Life Ins. Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987), on which the Ninth Circuit in this case correctly relied (Pet. App. B13).

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